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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., *et al., Petitioners,*

v.

DAVID M. BARRY, M.D., *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

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COMES NOW the National Association of Insurance Commissioners (NAIC), through its counsel of record, Jon S. Hanson, to move this Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for the Petitioners has consented to the filing of the attached brief. The consent of counsel for Respondents was requested but refused.

The interest of the NAIC as *amicus curiae* is set forth at pages 1-2 of the attached brief. The specific issue in this case is the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act, 15 U.S.C. § 1011-15 (1970). Since the provisions of that Act recognize and support the authority of the members of the NAIC to regulate the business of insurance in the United States, any limitation on that authority through a broadening of the Act's exception will directly affect each member of the NAIC. The attached brief describes the adverse impact of the lower court's decision on the ability of state insurance commissioners to regulate the business of insurance in the public interest and offers a suggested standard for this Court to follow in this and future cases involving the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act.

Respectfully submitted on this 30th day of December, 1977,

/s/
Jon S. Hanson
Counsel of Record

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BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is an unincorporated association of the principal insurance regulatory officials charged by law with the responsibility of supervising the business of insurance within each state, territory and insular possession of the United States. Since each of its members regulates the business of insurance as Congress intended under the McCarran Act, 15 U.S.C. § 1011-15 (1970), any interpretation of that Act which modifies or diminishes the present scope of state insurance regulation would seriously jeopardize the ability of each member of the NAIC to continue to oversee the business of insurance in the

public interest. The lower court's expansive view of the "boycott, coercion, or intimidation" exception to the McCarran Act, in the opinion of the NAIC, would lead to such a modification or diminution. For this reason the NAIC is vitally interested in the outcome of this litigation.

The effect of the lower court's ruling would be to allow policyholders to sue insurers under federal antitrust laws whenever insurer activity took on the appearance of a "concerted refusal to deal," or boycott. Because the risk assessment process in insurance theory, by its very nature, often involves both concerted activity and refusals to deal on the part of insurers, an inherent inconsistency arises between fundamental principles of insurance theory and the lower court's expansive definition of the "boycott, coercion, or intimidation" exception to the McCarran Act. The purpose of the attached brief is to describe in greater detail the nature of this inconsistency and explain the serious ramifications it creates for state insurance regulation.

Because this case involves the impact of antitrust principles on fundamental precepts of insurance theory the NAIC believes that its experience in regulating the insurance business can provide this Court with needed insights into insurance principles which the parties to this case may not be equipped to provide for a proper resolution of this dispute. Moreover, as an organization of state government officials charged by law with regulating the business of insurance in the public interest, the NAIC believes that it stands in a unique position to advise this Court of the actual and potential harms to the public interest which would result if the lower court's decision is not reversed or modified.

ARGUMENT

I. THE INCLUSION OF INSURER-INSURED RELATIONSHIPS WITHOUT LIMITATION UNDER THE SCOPE OF THE "BOYCOTT, COERCION, OR INTIMIDATION" EXCEPTION TO THE McCARRAN ACT WOULD SERIOUSLY IMPEDE THE ABILITY OF THE STATES TO REGULATE THE BUSINESS OF INSURANCE.

The lower court in its decision below held that the phrase "boycott, coercion, or intimidation" in the McCarran Act, 15 U.S.C. §1013(b) (1970), included within its scope alleged boycotts of policyholders by insurance companies who were in the business of selling medical malpractice insurance policies to Rhode Island doctors. *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 12 (1st Cir. 1977). Although the court below recognized that its decision contradicted "a rather formidable array of authorities," 555 F.2d at 7, it nevertheless felt compelled by the "wording" of the McCarran Act "and its legislative history" to broaden the scope of the "boycott" exception. *Id.*

In support of its novel position the First Circuit Court of Appeals noted that "the introduction of antitrust principles . . . between policyholders and insurers" would not "hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." 555 F.2d at 8. As *amicus curiae* the NAIC strenuously disagrees with this contention. Because state insurance regulation exists primarily "to pro-

tect the weaker contracting party,"[1] the thrust of most, if not all, state regulatory measures are aimed at "the relationship between insurer and insured." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). To interject a federal antitrust concept of "boycott, coercion, or intimidation" on existing state insurance regulatory measures which focus on insurer-insured relationships would seriously impede such measures by making the federal courts the final regulator of insurance industry conduct.

A. Principles of Risk Assessment in Insurance Theory and the Federal Antitrust Concept of "Boycott"

The result of the lower court's decision in this case is to impose upon the insurer-insured activities federal antitrust prohibitions against boycotts. Because the business of insurance utilizes certain principles of risk assessment which are inimical to the concept of "boycott" under federal antitrust laws, an understanding of the inherent contradiction between these two ideals is critical for a proper resolution of the specific McCarran Act controversy now before this Court.

It is a fundamental tenet of insurance theory that "the basic function of insurance is to deal with risk."[2] Risk assessment, then, is central to the "business of insurance"; by measuring "the probable variation of actual experience from expected experience"[3] insurance companies

[1] Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 523 (1961) [hereinafter cited as Kimball].

[2] R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 19 (15th ed. 1972) [hereinafter cited as R. MEHR & E. CAMMACK].

[3] *Id.* at 20.

offer their insureds the substitute of "a small, definite cost (the premium) for a large but uncertain loss,"[4] with the hope that the "law of large numbers" will eventually return a profit to the companies for their risk-reducing services. Traditionally, risk assessment in insurance theory has been accomplished through two separate, but related, procedures: rating and underwriting.[5] Rating is the process "by which companies determine the premium amounts an individual should pay";[6] underwriting is the process of selecting risks "in order to determine which of those within a given class offers a probability of loss below that for the average of the class."[7]

Implicit in the underwriting process of risk assessment is the insurance company's prerogative not to insure particular risks. This prerogative exists to protect the insurance company against the phenomenon of "adverse selection":

> Whenever a large group of potential insureds are treated alike irrespective of some factor that differentiates them as insurance risks, a disproportionately high percentage of applications for such insurance tends to come from the less desirable applicants because they get the better bargain.[8]

Since there will always be selection in insurance, the only question which must be answered is "whether the

[4] *Id.* at 32.

[5] COMMONWEALTH OF MASS., DIVISION OF INSURANCE, RESEARCH PAPERS ON CLASSIFICATION SYSTEMS IN AUTOMOBILE INSURANCE 2-3 (unpublished working papers prepared for use during automobile rate hearings, Sept. 1977).

[6] *Id. See also* R. MEHR & E. CAMMACK at 641.

[7] R. HOLTON, UNDERWRITING PRINCIPLES AND PRACTICES 123 (1973).

[8] R. KEETON, BASIC TEXT ON INSURANCE LAW 8 (1971).

selection will be done by the insurance company or by the insurance buyer."[9] In the absence of massive government subsidies to insurers the only feasible answer to this question is to allow insurance companies to be selective in choosing the risks they wish to insure;[10] otherwise insurance coverage would be provided at a loss — a result which would ultimately lead to either the financial impairment of insurers or a broadscale unwillingness of insurers to write any business, i.e., insurance unavailability.

A basic characteristic of the rating aspect of the risk assessment process is the inherent necessity for insurance companies to share information about their claims and loss experience. Because premium rates

> are constructed primarily from statistical data . . . [t]he accuracy of the rates, as measures of relative expected losses and expenses, increase with the number of insured exposure units embraced by the data.[11]

Thus, the need for a large pool of statistical data has led the insurance industry to develop and utilize the services of rating and statistical organizations to extract "information pursuant to a standardized plan from a large number of insurers" so that "sufficient information . . . to make accurate rates" is available to all participating insurers.[12] Not only does utilization of such organi-

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[9] R. MEHR & E. CAMMACK at 614.

[10] *See id.* at 615.

[11] J. HANSON, R. DINEEN & M. JOHNSON, MONITORING COMPETITION: A MEANS OF REGULATING THE PROPERTY AND LIABILITY INSURANCE BUSINESS 445 (1974) [hereinafter cited as MONITORING COMPETITION].

[12] *Id.* It might be noted that two conditions of effective competition are the existence of numerous sellers and the ease of entry into the market. The availability of pooled information contributes to both since smaller and medium sized companies, and even large companies for some lines of insurance, lack sufficient credible experience of their own.

zations by insurance companies provide the necessary data to make accurate rates, but it also offers a more efficient and economical method of employing scarce actuarial talent to perform services which would be duplicated by individual companies in the absence of a central data-gathering organization.[13]

If this Court's definition of term "boycott" in antitrust law is compared with the characteristics of the rating and underwriting processes just noted, a striking similarity emerges between the antitrust concept of boycott and the basic features of risk assessment in the business of insurance. The term "boycott" in antitrust law has been defined as a "concerted refusal to deal." *E.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212 (1957); *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 625 (1953). It implies two necessary elements: (1) concerted activity on the part of the accused parties from which an implied conspiracy can be inferred, and (2) a refusal to deal with others. As was just noted, however, the rating process in risk assessment, by its very nature, involves "concerted" action by insurance companies; when companies share actuarial talent and agree to compile their claims experience data through rating and statistical organizations they undertake "concerted" activities. Furthermore, the underwriting process in risk assessment, by its very nature, involves "refusals to deal" on the part of an insurer whenever there is an unwillingness to write a particular risk or class of risks to protect against the consequences of adverse selection.

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[13] MOWBRAY, BLANCHARD & WILLIAMS, INSURANCE: ITS THEORY AND PRACTICE IN THE UNITED STATES 502 (1969).

If the antitrust concept of "boycott" were extended to insurer-insured relationships the definition of "boycott" would come perilously close to describing the risk assessment process in the business of insurance. In fact, there appears to be little conceptual difference between a "concerted refusal to deal" under a "boycott" analysis and the combined effect of rating and underwriting in those situations where an insured is denied insurance or refused the renewal of existing insurance coverage. The rating process of risk assessment satisfies the "concerted activity" element of a boycott, while the underwriting process meets the "refusal to deal" standard. At the very least, insurance industry activity in the submission and compilation of experience data and the subsequent use of such data to support refusals or denials of insurance coverage would provide a superficial base for a judicial finding of an implied conspiracy to refuse insurance coverage. *E.g., United States v. Container Corp.,* 393 U.S. 333, 336-38 (1969); *United States v. American Linseed Oil Co.,* 262 U.S. 371, 389 (1923); *American Column & Lumber Co. v. United States,* 257 U.S. 377, 410 (1921).

The risk assessment process in insurance theory, therefore, and the term "boycott" under federal antitrust law are similar phenomena. Under the former label "concerted refusals to deal" are sanctioned and even required for a proper functioning of the insurance concept, while under the latter label they are prohibited as a violation of the Sherman Act. It is this inherent contradiction between insurance theory and antitrust law that lies at the heart of the McCarran Act controversy now before this Court.

B. Insurer-Insured "Boycotts" and State Regulation of the Risk Assessment Process.

The contradictory nature of insurance theory and the antitrust principle of a "boycott" takes on very practical significance when the various state laws regulating the risk assessment process are considered in light of the lower court's sanctioning of a federal cause of action for a "boycott" in this case. In regulating the "business of insurance" pursuant to the will of Congress under the McCarran Act, 15 U.S.C. § 1011 (1970), the states have developed detailed guidelines for insurance companies to follow in their risk assessment activities:

> The risk assessment process is of substantial importance to both buyers and sellers of . . . insurance. If companies fail to identify high risks in . . . insurance, they may sustain serious losses or endanger the financial well being of other policyholders. On the other hand, if companies improperly assess normal risks as high risks, consumers may suffer the consequences of overpricing. For these dual reasons — to protect the solvency of insurers while guarding the rights of consumers — government regulation has long involved itself in the risk assessment process.[14]

Contrary to the view of the First Circuit Court of Appeals in this case, "the introduction of antitrust principles into dealings between policyholders and insurers" would indeed "hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." 555 F.2d at 8. As *amicus curiae,* the NAIC suggests that the unlimited extension of antitrust principles to insurer-insured relationships will be particularly burdensome to state insurance regulators, and

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[14] COMMONWEALTH OF MASS., DIVISION OF INSURANCE, RESEARCH PAPERS, *supra* note 6, at 2-3.

in turn the insurance-consuming public on whose behalf they regulate, in at least four areas of insurance regulation: property-casualty insurance rates, insurance availability, approval of policy forms and company solvency.

1. Interference With State Regulation of Property-Casualty Insurance Rates.

Although insurance rates for individual life insurance, health insurance and ocean marine insurance, generally speaking, are not regulated by state insurance commissioners,[15] rates for property-casualty insurance are subject to the control of state insurance departments in virtually all states and the District of Columbia.[16] There is no question that insurance rating laws regulate the "business of insurance" as Congress intended under the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969); *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir.) *cert. denied* 409 U.S. 917 (1971). Although state laws regulating property-casualty rates follow at least nine different models or formats,[17] two broad categories of laws are generally recognized as appropriate descriptions of divergent state philosophies toward rate regulation: "prior approval" rating laws and "open competition" rating laws.[18] It is the belief of the NAIC that an extension of the "boycott, coercion, or intimidation" exception to the McCarran Act to insurer-insured relationships would not only severely hamper the ability of state insurance regulators to administer either type of rating law, but would place the ultimate regulatory authority over property-casualty insurance

[15] R. MEHR & E. CAMMACK, *supra* note 2, at 8.

[16] *See* MONITORING COMPETITION, *supra* note 11, at 58.

[17] *See id.* at 54-57.

[18] *See id.* at 57. *See also* R. MEHR & E. CAMMACK at 793 ("mandatory" versus "permissive" rating laws).

rates in the hands of the federal courts.

Under a "prior approval" rating law insurers are required to submit their rate proposals to the insurance department in advance subject to department's approval or disapproval. Rates may be filed either by insurers individually or by a rating bureau on behalf of insurers who use the bureau rates. Once the proposed rates have been filed with the insurance department, the commissioner of insurance reviews the filings under a statutory standard that rates not be "excessive, inadequate nor unfairly discriminatory."[19] One of the primary purposes of the commissioner's review of the proposed rates is to ensure that "the insured gets what he pays for."[20]

If this Court extends the "boycott" exception to insurer-insured relationships on an unlimited basis, the decision of the commissioner approving particular property-casualty rate levels in "prior approval" states will be subject to challenge by insureds who are dissatisfied with the commissioner's approval of the particular rate which they must pay. For example, insureds or potential insureds could invoke the boycott exception by simply alleging that they were refused coverage at a "reasonable" rate. The facts of *Meicler v. Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975) bear out this contention, as does the dicta in *Proctor v. State Farm Mutual Auto Insurance Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977). By allowing insureds to sue insurers under federal antitrust laws this Court would in effect substitute the federal court's rulings on the existence of a "boycott" for the

[19] MONITORING COMPETITION at 54-55; R. MEHR & E. CAMMACK at 793. *See also* NAIC Model Casualty and Surety Rate Regulatory Bill, § 3(a)(4), PROCEEDINGS OF NAIC 399 (1946); NAIC Fire, Marine and Inland Marine Rate Regulatory Bill, § 3(a)(2), PROCEEDINGS OF NAIC 411 (1946).

[20] Kimball, *supra* note 1, at 491.

state insurance commissioners' decisions that a particular rate is or is not "excessive, inadequate or unfairly discriminatory."

Similarly, the lower court's extension of the "boycott" exception to insurer-insured relationships would undercut the authority of state insurance commissioners to regulate property-casualty insurance rates in "open competition" states. Since under "open competition" rating laws insurers are neither required to seek advance approval of their rates by the commissioner nor allowed to agree to adhere to bureau rates,[21] the principal test for the "reasonableness"[22] of rates is the degree of competition which exists within the industry with regard to specific lines of property-casualty business.[23] An important element of the commissioner's role in regulating insurance rates in "open-competition" states, therefore, is to monitor and enforce competition within the insurance industry and, if insufficient competition exists, to reimpose some type of rate approval mechanism.[24] An insurance commissioner's determination that rates were not "excessive" because an adequate degree of competition was found to exist could, in effect, be overturned if

[21] MONITORING COMPETITION at 395.

[22] Like the rating standard under "prior approval" laws, rates will be found to be "reasonable" under an "open competition" law if they are not "excessive, inadequate or unfairly discriminatory." *Id.* at 401. *E.g.*, MINN. STAT. § 70A.04(2) (1968); UTAH CODE ANN. § 31-18-5 (1974); WIS. STAT. § 625.11(1) (1975).

[23] *See* MONITORING COMPETITION at 420.

[24] *See id.* at 132-137, 407. At the recent December, 1977 meeting of the NAIC the NAIC Regulatory Information Subcommittee directed the distribution of a report which outlined for all insurance commissioners a basic program for monitoring competition. This report, as well as other activities of the Subcommittee, reflects the strong interest of the NAIC in developing "workable tests of competition" for the insurance industry. *See* I PROCEEDINGS OF NAIC — (1978).

insureds are allowed to sue insurers under federal antitrust laws for alleged refusals to deal at a desired or "reasonable" rate. In short, an expansive interpretation of the "boycott" exception would give the federal courts the final word on the issue of "excessiveness" of rates in "open competition" states.

2. Interference with State Regulation of Insurance Availability.

A second rationale underlying state regulation of the risk assessment process is the objective of "making insurance facilities available to all people of the state who should reasonably be expected to have these facilities."[25] It is important to recognize that the availability of insurance is often an integral part of contemporary solutions to social problems:

> Insurance does not exist in a vacuum, but in a complex modern society with a developed and dynamic economy. The industrialization and urbanization of modern life, with the attendant deterioration of such social institutions as the extended family which were of vital importance in generations gone by, have brought pressing social problems which cry aloud for solution. In many of them, insurance can be made to play a key role.[26]

By specifically enhancing insurance availability states have frequently employed the insurance mechanism to solve broader socioeconomic problems which, to varying degrees, are premised on "man's search for security."[27]

[25] R. MEHR & E. CAMMACK, *supra* note 2, at 778.

[26] Kimball, *supra* note 1, at 511-12.

[27] *See id.* at 513.

The use of insurance to address such problems has been labeled "socialization of risk":

> If insurance is to carry out fully its role in our society — if it is to provide security and the *sense* of security on a broad basis — it must include almost everyone, at least in certain key fields. Pressure for the extension of insurance coverage is an aspect of what one may call, very loosely, the socialization of risk.[28]

The abolition of tort liability for work-related injuries at the turn of this century represented the first experiment with "socialization of risk" by the states; the Worker's Compensation Acts promulgated during the first two decades of the century eliminated "fault" as a criterion for compensating employees in return for a cerain level of benefits funded by the compulsory insurance coverage of employers.[29] Not long after the Worker's Compensation experiment states began to utilize — on a more limited scale — the "socialization of risk" principle in the automobile insurance field. States addressed the growing problems of automobile accident reparations by enacting compulsory insurance and financial responsibility laws with accompanying automobile insurance plans to provide insurance to "applicants (rejected risks) who could not obtain automobile liability insurance in the usual manner."[30] Like the predecessor Worker's Compensation Acts, the automobile insurance plans were a type

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[28] *Id.* at 512.

[29] J. LEE, SERVICING THE SHARED AUTOMOBILE INSURANCE MARKET 8-1 (1977) [hereinafter cited as J. LEE]; REPORT OF THE NATIONAL COMM. ON STATE WORKMEN'S COMPENSATION LAWS 34 (1972).

[30] J. LEE at 9. The states of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New

of "residual market mechanism"[31] which introduced "socialization of risk" principles as part of an overall package of accident-loss reparations reform.[32]

Today the "socialization of risk" concept has been expanded beyond the worker's compensation and automobile liability insurance examples to almost all phases of the property-casualty insurance field as part of an attack on broader socioeconomic problems. Fair Access to Insurance Requirements, or FAIR Plans, have been enacted in 28 states[33]

> to make fire and extended coverage insurance available to persons having difficulty finding insurers who would write this insurance for them. . . ."[34]

Joint Underwriting Associations, or JUA's, have been established in 35 states[35] to provide medical malpractice

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Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming are currently served by automobile insurance plans. AUTOMOBILE INSURANCE PLANS OFFICE, INSURANCE FACTS — 1977 at 3 (1977).

[31] Besides the automobile insurance plans, three alternative forms of residual market mechanisms have been implemented by the states to deal with the residual automobile insurance market. These alternative forms include reinsurance facilities, joint underwriting associations and a state-operated insurance company. J. LEE at 14.

[32] *See* CALIFORNIA CITIZEN'S COMM. ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 3 (1977) [hereinafter cited as CALIF. CITIZEN'S COMM.].

[33] These states include California, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Virginia, Washington and Wisconsin. *See* I PROCEEDINGS OF NAIC 693 (1977).

[34] R. MEHR & E. CAMMACK, *supra* note 2, at 779.

[35] These states include Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota,

insurance to health care providers "who cannot obtain coverage in the private insurance market"[36] because of rapidly changing conditions in the health care liability field. Moreover, 23 states[37] have recently instituted or are planning to institute "Market Assistance Programs," or MAP's, for products liability insurance to alleviate the short-term insurance availability needs of manufacturers and suppliers until solutions are found to the broader problems of product liability.[38] Each residual market program plays an important role in "socializing" to varying degrees the respective insurance risks which reflect underlying socioeconomic problems.

The vulnerability of the various residual market mechanisms to boycott litigation results from a combination of two factors. First, residual market mechanisms are typically operated by insurers on a collective basis, even though under the directives of state insurance codes and the supervision of the insurance commissioner. Second, even under residual market programs not all risks are insurable; unlicensed drivers and hazardous property locations are examples of such uninsurable risks. Since

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Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia and Wisconsin. IV NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, NAIC MALPRACTICE CLAIMS 131-32 (May, 1977) [hereinafter cited as NAIC MALPRACTICE CLAIMS].

[36] *Id.* at 148.

[37] These states include Arkansas, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington and Wisconsin. Miller, *Report on Status of State Activation of Insurance Industry's Voluntary Response to Alleged Product Liability Insurance Availability Shortage,* I PROCEEDINGS OF NAIC — (1978).

[38] *See* Report of the Products Liability (D2) Industry Advisory Committee, II PROCEEDINGS OF NAIC 635, 652 (1977).

insurers work together under residual market mechanisms and since coverage may be denied in certain instances — no matter how meritorious the denial — the elements of a "concerted refusal to deal," or boycott, are inherent in the insurers' activities in the residual market programs. As a consequence, an expansive definition of the "boycott" exception to the McCarran Act jeopardizes a host of residual market programs now functioning in most states.

The illogic of extending the "boycott" exception to insurer-insured relationships in the context of insurance availability arises from the narrow perspective of the antitrust concept of "boycott." The various state insurance laws establishing residual market mechanisms *assume* that the insureds on whose behalf the residual market mechanisms operate cannot obtain insurance coverage in the voluntary marketplace.[39] This assumption stems from a recognition that a lack of insurance availability is essentially a symptom of deeper, socioeconomic problems,[40] of which "social inflation,"[41] economic inflation,[42] expanding public concepts of adequacy or com-

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[39] *See* J. LEE, *supra* note 29, at 9; NAIC MALPRACTICE CLAIMS, *supra* note 35, at 148; U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, REPORT OF THE FEDERAL INSURANCE ADMINISTRATION 1 n. 1 (1974). *See also* NEV. REV. STAT. § 686B.180 (1973); N. H. REV. STAT. ANN. § 404-C:1 (1976); WIS. STAT. § 619.01 (1975).

[40] *See* J. LEE, *supra* note 29, at 5. *See also* FEDERAL INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT at I-21 (1977) [hereinafter cited as PRODUCT LIABILITY REPORT]; U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM. ON MEDICAL MALPRACTICE 4 (1973) [hereinafter cited as MEDICAL MALPRACTICE REPORT].

[41] Watkins, *Social Inflation: Our Next Trial,* INSURANCE MAGAZINE 42 (Sept. 1976). *See also* CALIF. CITIZEN'S COMM., *supra* note 32, at 6; MEDICAL MALPRACTICE REPORT at 3, 25; PRODUCT LIABILITY REPORT at I-29 to I-30.

[42] *See* CALIF. CITIZEN'S COMM. at 10; J. LEE at 5; PRODUCT LIABILITY REPORT at I-29.

pensation,[43] and the depersonalization of industrial society[44] are only a few. By addressing the insurance availability consequences of these problems through residual market mechanisms states are able to satisfy the immediate insurance needs of certain segments of the insurance-buying public while simultaneously instituting long-range social reforms on a broader scale. If the various state residual market mechanisms are rendered illegal, uncertain or circumventable by individuals or groups of persons involved in an antitrust lawsuit, all efforts to make insurance available to the maximum extent possible through residual market pooling mechanisms could come to a grinding halt.

Moreover, regulatory approaches aimed at assuring availability of insurance coverages are designed to benefit a broad spectrum of potential policyholders without the necessity of lengthy and costly antitrust litigation. FAIR Plans, for example, make insurance coverage available to property owners in the inner cities.[45] In most cases these property owners do not constitute a politically effective group. If the availability of insurance coverage is made to depend on federal antitrust litigation instead of state residual market mechanisms such as FAIR Plans, only the most organized, financially-supported groups — such as state medical societies — will be able to enforce their "rights" to needed insurance coverage. Other persons, such as inner city property owners, may be less

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[43] *See* CALIF. CITIZEN'S COMM. at 9. *See also* MEDICAL MALPRACTICE REPORT at 70.

[44] *Cf.* MEDICAL MALPRACTICE REPORT at 25 (depersonalized physician-patient relationships).

[45] *See* REPORT OF THE FEDERAL INSURANCE ADMINISTRATION, *supra* note 39, at 1 n. 1.

capable of enforcing their "rights" to "essential insurance" in the federal courts.[46]

Although the sanctioning of federal "boycott" actions by insureds may appear, on its surface, to be a reasonable alternative to the various residual market mechanisms promulgated by the states to "socialize risks,"[47] it does not provide an institutional framework for effecting collateral social reforms. The narrow, monolithic standard of a "concerted refusal to deal" was never intended to be a vehicle for "socializing risks" in society; its application to social and economic problems extending beyond the general scope of the Sherman Act promises to be counterproductive. Moreover, rendering residual market programs vulnerable to boycott actions may well lead to their demise. Such a result, in turn, will deprive the vast majority of underprivileged policyholders of an effective vehicle to obtain necessary insurance coverage.

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[46] The recent restrictions placed on class actions pursuant to F. R. CIV. PROC. 23 are an example of these obstacles. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) this Court held that plaintiffs "must bear the cost of notice to the members of [their] class." At least one commentator has observed that this decision

> may well mark the end of massive class actions in both federal and state courts because of the prohibitive nature of the burden that decision places on the representative plaintiffs.

Note, *State Class Action Statutes: A Comparative Analysis*, 60 IOWA L. REV. 93, 119 (1974). Certainly the *Eisen* requirements, at a minimum, will create hardships for inner city property owners and similar economically disenfranchised groups to press their claims for insurance availability through class action federal antitrust lawsuits.

[47] *But see* U.S. DEP'T OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE 347 (Report to the Task Force on Antitrust Immunities, Jan., 1977) (Justice Department acknowledges necessity for "mandatory pooling mechanisms" for automobile liability insurance).

3. Interference with State Regulation of Policy Forms.

A third regulatory function of state insurance laws which would be seriously undermined by an extension of the "boycott" exception to the McCarran Act is the control of policy terms:

> Control over terms ensures both that coverage will be more precisely defined and that restrictive clauses will not unfairly prejudice the policyholder, whether by making his bargain a bad one or by misleading him.[48]

States specifically control the content of insurance policies in one of two ways. The most direct form of control is to mandate policy forms or standard policy provisions by statute; standard policies for fire and worker's compensation insurance and standard provisions for life and health insurance are examples of statutorily-mandated requirements.[49] A second, less direct and more commonly used technique to control policy content is to grant to the commissioner of insurance the general authority to review and approve policy forms.[50] After proposed contract forms are filed with the department of insurance the commissioner reviews the forms to ensure that the policy language is not misleading, that exclusions are not unreasonable, that benefits are reasonable in relation to

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[48] Kimball, *supra* note 1, at 493.

[49] R. MEHR & E. CAMMACK, *supra* note 2, at 812. *See also* NAIC Individual Accident and Sickness Insurance Minimum Standards Act, I PROCEEDINGS OF NAIC 49-53 (1977); NAIC Group Life Insurance Definition and Group Life Insurance Standard Provisions Model Bill, II PROCEEDINGS OF NAIC 361-69 (1956).

[50] Kimball, *supra* note 1, at 493; R. MEHR & E. CAMMACK, *supra* note 2, at 812, *E.g.*, CALIF. INS. CODE §§ 10205, 10270.9 (West 1972); N.Y. INS. LAW §§ 161, 162 (McKinney 1966); WIS. STAT. § 206.17 (1975).

premiums, etc.[51] "Claims made" medical malpractice policies,[52] punitive damage exclusions in general liability policies[53] and mechanic lien waiver conditions in title insurance policies[54] are recent examples of the type of contract terms which may be controlled through the insurance commissioner's review of policy forms.

A broad construction of the "boycott" exception to the McCarran Act would place insurance policy form development and the state approval mechanism in conflict with federal antitrust "boycott" prohibitions. This could arise from a combination of factors. Whenever a policyholder did not obtain the precise coverage he/she desired — such as a policy with high limits, low or no deductible, unlimited types of coverage, certain policy provisions — the policyholder could easily frame an antitrust complaint in terms of alleged insurer "refusal to deal," i.e., refusal to provide the coverage the policyholder wants. When this possibility is combined with the vulnerability

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[51] R. MEHR & E. CAMMACK, *supra* note 2, at 812; NAIC Model Accident and Health Policy Regulatory Law, II PROCEEDINGS OF NAIC 296-98 (1956).

[52] The following state insurance departments have approved "claims made" insurance policies: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. Journal of Commerce, July 11, 1975, at 2, col. 3.

[53] Just recently the Insurance Services Office, a rating and statistical organization, announced plans to "exclude punitive damages from all policies providing liability insurance." Journal of Commerce, August 23, 1977, at 10, col. 1. Before such an exclusion could take effect in a given state, it would have to be approved by the insurance commissioner of that state. *See* note 50 *supra*.

[54] *See* McIlhenny v. American Title Ins. Co., 418 F.Supp. 364, 366-67 (E.D. Pa. 1976).

of policy form development to the allegation of an implied conspiracy due to rating bureau policy form activity and the sharing of information among insurers,[55] allegations of a "concerted group refusal to deal," or "boycott," are inevitable. *See United States v. Container Corp.*, 393 U.S. 333, 336-38 (1969); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410 (1921). The broad definition of the "boycott" exception would thus enable private as well as federal challenges to insurer activity even though the insurer had complied with state insurance laws and had obtained insurance department approval of the very policy giving rise to the "boycott" claim. *See McIlhenny v. American Title Insurance Co.*, 418 F.Supp. 364, 371 (E.D. Pa. 1976). Such a result would surely contradict this Court's earlier determination that state regulation of the business of insurance encompasses regulation of "the type of policy which [can] be issued." *SEC v. National Securities, Inc.*, 393 U.S. at 460.

4. Interference with State Regulation of Insurance Company Solvency.

A major reason states regulate the business of insurance is to protect the solvency of insurers:

> Insurance is one important modern way that man seeks security in a world in which it does not exist naturally. It is thus not surprising that all systems of insurance regulation regard the financial solvency of the insurance enterprise as the central aim, for if nothing else, insurance must *insure*.[56]

[55] Policy forms can be developed in a myriad of ways. Many insurers develop their own forms. Such forms are typically developed with the knowledge of other forms in the marketplace, either through a voluntary exchange of information or through the review of other company filings with the department of insurance. Other policy forms are developed through rating bureaus which individual insurers may use in whole or in part. *See generally* R. KEETON, *supra* note 8, at § 2.10.

This Court clearly recognized that insurer solvency is basic to the "business of insurance" and an integral part of the insurer-insured relationship when it observed that the "reliability" of insurance policies lie at "the core of the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 460.

The inclusion of the insurer-insured relationship within the "boycott, coercion, or intimidation" exception to the McCarran Act would seriously undermine state regulation of insurance company solvency. Because the antitrust concept of a "boycott" does not recognize that the financial condition of an insurer may justify its "refusal to deal" with other parties,[57] state attempts to regulate the "reliability" of the insurer's relationship to insureds would be thwarted by federal antitrust actions in every instance where an insurer, under its own volition or pursuant to an insurance commissioner's suggestion, reduced its book of business to bolster its financial condition or increased its premium rates to rejuvenate depleted surplus accounts.

The most common enforcement mechanism used by state insurance commissioners to regulate the financial solvency of insurers is to monitor the financial condition of the insurer and utilize the extensive licensing authority provided in state insurance codes[58] to influence the in-

[56] Kimball, *supra* note 1, at 480.

[57] *See* MONITORING COMPETITION, *supra* note 11, at 438.

[58] Pfennigstorf, *The Enforcement of Insurance Laws*, 1969 WIS. L. REV. 1026, 1047 n. 80.

surer's underwriting practices. If, after reviewing the insurer's annual statement,[59] the commissioner determines that the insurer's surplus accounts have been eroded by losses in underwriting or investment operations,[60] the commissioner may use the "significant leverage"[61] of a license revocation, suspension or nonrenewal to "encourage" the insurer to restrict or reduce its volume of business until such time as the insurer's surplus account reaches an acceptable level.[62] Should an insurer fail to heed a commissioner's suggestion and continue to write new business without regard to the adequacy of its surplus accounts, the commissioner could actually suspend, revoke or limit the insurer's certificate of authority to protect policyholders from a potential insolvency.

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[59] R. MEHR & E. CAMMACK, *supra* note 2, at 811:

> Insurance companies are required to file annual reports with insurance departments of the states in which they do business. These reports are made in accordance with a form (called the 'convention blank') developed by the National Association of Insurance Commissioners. These reports are detailed as to premium income, expenses, investments, reserves and other financial information.

[60] For a discussion of the role of surplus accounts under fundamental principles of insurance accounting, *see* R. MEHR & E. CAMMACK at 677-711; Roddis & Stewart, *The Insurance of Medical Losses,* 1975 DUKE L. J. 1281, 1285-89.

[61] MONITORING COMPETITION, *supra* note 11, at 482. *See also* Pfennigstorf, *supra* note 58, at 1047.

[62] Much has been written about the precise level at which surplus accounts should be deemed acceptable by state insurance regulators. Generally speaking, a "rule of thumb expounded for years" has been that "premiums written by a property-liability insurer should not exceed twice its policyholders surplus." R. MEHR & E. CAMMACK at 704. Although such a rule is too rigid if applied without "judgment and intelligent analysis," *id.,* it can be a useful regulatory tool to guard against insurer insolvencies if used properly and in conjunction with other "early warning" audit ratios. *See* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, USING THE EARLY WARNING SYSTEM; NAIC REGULATORY TESTS FOR PROPERTY AND LIABILITY INSURERS 1, 4-5 (1976).

If insureds were allowed to bring an action against an insurer under an antitrust theory of "boycott, coercion, or intimidation" whenever insurers are forced to reduce their volume of business because of the weakened condition of their surplus accounts, the insurer's flexibility to manage its financial condition and the commissioner's power to order a reduction in underwriting activities would be thwarted by the insurer's potential liability under federal antitrust laws. Since the reduction of an insurer's book of business — for whatever reason — involves a refusal to write certain types or classes of business, and since such refusals are based in whole or in part on information obtained from industry-wide collection efforts, a federal court could easily find that a voluntary or state "suggested" reduction of underwriting activity constituted , at a minimum, a sufficient basis to permit a "boycott" action to proceed under a "concerted refusal to deal" standard. The mere existence of a threat of antitrust liability would therefore exert a definite chilling effect on a commissioner's "suggestion" to an insurer to reduce its book of business. As a result, the commissioner would lose the practical "leverage" of a license revocation, suspension or nonrenewal to compel insurers to enhance their financial solvency.

Besides the threat of licensure revocation, insurance commissioners may utilize state rating laws as enforcement mechanisms for regulating insurance company solvency in the property-casualty field. Both "prior approval" and "open-competition" rating laws not only require that rates not be "excessive," but both types of laws also direct that rates be "adequate." In "prior-approval" states commissioners may specifically disapprove filed rates

which are judged to be "inadequate,"[63] while many commissioners in "open competition" states have the power to "reimpose prior approval filing requirements"[64] if competition proves to be "detrimental to the solvency of insurers."[65]

If this Court extends the definition of the "boycott" exception as Respondents request, the regulation of insurance company solvency through state rating laws will likewise conflict with federal antitrust actions. It is not difficult to imagine a situation where a commissioner's disapproval of a rate filing in a "prior approval" state or reimposition of rate filings in an "open competition" state where "inadequate" rates were suspected would lead to litigation and a possible federal court determination that the commissioner's decision resulted in a "boycott." In such cases the interest of the states and the insurance-consuming public in having solvent insurers would stand in direct conflict with litigants asserting their allegations pursuant to an expansive "boycott" exception.

C. The Doctrine of *Parker v. Brown* Provides Few Protections Against Federal Antitrust Law Interference With the Insurance Regulatory Process.

A basic, albeit erroneous, premise of the lower court decision is the assumption that an expansive interpretation of the boycott exception would not "hamstring" the state insurance regulators in their responsibilities. The court stated that "[t]he boycott provision *merely neu-*

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[63] MONITORING COMPETITION at 55.

[64] *Id.* at 407.

[65] N.Y. INS. LAW § 176(2)(c) (McKinney 1966). *See also* MONITORING COMPETITION at 407.

tralizes that Act, leaving intact the doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability." 555 F.2d at 8 (emphasis added). The lower court's predication of its decision on this assumption suffers from two fatal defects.

First, in effect, the lower court is saying that the boycott provision *repeals,* i.e., "neutralizes," the McCarran Act and that the state insurance regulatory system must stand or fall depending upon the application of pre-McCarran Act case doctrine. This interpretative approach clearly usurps congressional authority to enact legislation by suggesting that courts may "neutralize" congressional actions through judicial failure to implement statutory mandates.[66]

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[66] The combination of the lower court's predisposition in favor of "free competition" and "free market places," 555 F.2d at 9, and the dissent's suggestion that the court disagrees with the policies of the McCarran Act, 555 F.2d at 13, may explain the court's willingness to disregard the congressional enactment of the McCarran Act. Two points are worth noting in this context.

First, the manner in which state insurance regulation and the insurance industry are evolving reflects increasing reliance on competition as a prime insurance regulatory technique. In fact, strong arguments have been made that the enhancement of meaningful competition in the economic sense can be better fostered in the insurance industry under state insurance regulation than under federal antitrust laws. *See* MONITORING COMPETITION at 465-94, 538-61.

Second, national policy supporting state regulation of insurance predates national antitrust law. In *Paul v. Virginia,* 75 U.S. (8 Wall) 168 (1869), this Court held that "issuing a policy of insurance is not a transaction of commerce." *Id.* at 183. For 75 years this case was generally construed to mean that insurance was not interstate commerce and thus not subject to federal jurisdiction. Consequently, insurance regulation developed at the state level. In *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), this Court overturned 75 years of legal precedent. Congress immediately enacted the McCarran Act in 1945 to assure the continued primacy of state insurance regulation. Thus, except for the brief hiatus between the *South-*

Second, the lower court rationale ignores the narrowly circumscribed scope of antitrust immunity afforded by the *Parker v. Brown* doctrine in light of more recent cases. That decision has been most often cited for the proposition that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 616 (1976) (Stewart, J., dissenting), *quoting Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Since the original articulation of the *Parker v. Brown* doctrine this Court has had an opportunity to refine the scope of the state-action exemption noted therein. *E.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Such cases have eroded the scope of the *Parker v. Brown* doctrine by refusing to grant an exemption from federal antitrust liability where "the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976).

This Court's recent restriction of the *Parker v. Brown* doctrine in *Cantor v. Detroit Edison Co.* is particularly noteworthy. In *Cantor*, this Court held that a state-approved utility tariff was not a sufficient basis for implying an exemption from federal antitrust laws where the tariff included an anticompetitive "lamp-exchange program" initiated by private utilities. 428 U.S. at 598. In refusing

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Eastern Underwriters decision and the McCarran Act, the primacy of state insurance regulation has been national policy for well over 100 years. The Sherman Act, by comparison, did not arrive on the scene until 1890.

to grant an exemption from federal antitrust laws it was emphasized that this Court

> has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law. 428 U.S. at 600.

By refusing to grant an exemption from antitrust laws under the facts of the *Cantor* case the *Parker v. Brown* doctrine has been significantly reduced to situations where only *direct* state activity is in question.

The limited scope of the *Parker v. Brown* doctrine has a significant impact on the case now before this Court. Since most state insurance regulatory measures contemplate "a mixture of private and public decision-making" the lower court's reliance on *Parker v. Brown* is grossly misplaced. That doctrine offers state insurance regulation few, if any, safeguards against federal antitrust law interference if the major thrust of the McCarran Act is, in the words of the lower court, "merely neutralized" by extending the "boycott" exception to insurer-insured relationships. For example, it was noted earlier that state laws regulating property-casualty insurance rates follow nine different patterns or formats.[67] Only one category of these laws — representing two states[68] — involves direct state-made insurance rates. In virtually all other states "the initiation and enforcement" of property-casualty insurance rates is accomplished through "a mixture of private and public decision-making," i.e., insurer or rating bureau rate development and state insurance department

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[67] *See* note 17 *supra* and accompanying text.

[68] These two states are Massachusetts and Texas. *See* MONITORING COMPETITION at 45.

approval or acceptance of such rates. If reliance is placed on *Parker v. Brown* rather than upon the McCarran Act, "the mere fact that a state regulatory agency" had either approved an insurance rate or allowed a rate to be "implemented" until a revised rate was "filed and approved" would not be "a sufficient reason for conferring antitrust immunity" on private insurance company activity, *Cantor v. Detroit Edison Co.,* 428 U.S. at 602. Thus, virtually every insurance rate established pursuant to either a "prior approval" or "open competition" rating law, under the first circuit's rationale, would be a potential target for an insured's claim of "boycott, coercion, or intimidation."

Nor are state rating laws the only example of state insurance regulatory measures which would find no protections from the *Parker v. Brown* doctrine if the "boycott" exception to the McCarran Act is extended to insurer-insured relationships. It will be recalled that an important method of regulating insurance policy terms is to require the insurance commissioner's approval of all policy forms. Since policy forms must first be drafted by the insurance company before presentation to the insurance commissioner, state regulation of policy terms clearly includes "a mixture of private and public decision-making." If insureds are allowed to bring federal antitrust actions against insurers under a "boycott" theory whenever a policy exclusion or limitation appears to them to be a "concerted refusal to deal," the combination of the lower court's decision and the *Cantor v. Detroit Edison Co.* decision indicates that the commissioner's prior approval of the policy will not be sufficient state action to qualify for the *Parker v. Brown* exemption. The absence of this exemption places in great doubt the scope

of insurance commissioners' ultimate authority to review and approve insurance policy language.

In sum, the first circuit's broad definition of the "boycott" exemption cannot be supported by its assumption that state insurance regulation would not be "hamstrung" because of the protections afforded by the *Parker v. Brown* doctrine. Not only is this assumption erroneous as a matter of law, but if permitted to stand, would usurp congressional authority and inhibit state regulatory efforts to fashion protections for the entire insurance-consuming public. Certainly such a result is inconsistent with

> Congress' purpose . . . to give support to the existing and future state systems for regulating and taxing the business of insurance.

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429 (1946).

II. A SUGGESTED STANDARD FOR DEFINING THE SCOPE OF THE "BOYCOTT" COERCION, OR "INTIMIDATION" EXCEPTION TO THE McCARRAN ACT.

The case now pending before this Court embodies the fundamental issue of defining the scope of the "boycott" exception to the McCarran Act. The resolution of the issue has been the subject of considerable disagreement among the lower courts. The weight of authority in the lower courts has construed the "boycott" exception to the McCarran Act narrowly to encompass only those "boycotts, coercions, or intimidations" directed against insurance companies and agents.[69] On the other hand, the First Circuit Court of Appeals in this case, as well

[69] Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Meicler v. Aetna Cas. &

as dicta in cases decided by the second,[70] third[71] and fourth[72] circuits, has broadly construed that exception to include relationships between policyholders and insurers. More recently, the Court of Appeals for the District of Columbia[73] urged a middle ground approach when it declined to adopt the narrow construction of the boycott exception but at the same time did not find sufficient guidance for the proposition that the McCarran Act exception encompasses all acts of "boycott, coercion, or intimidation." In other words, that court would construe the scope of the "boycott" exception not so broadly so as to emasculate the McCarran Act nor so narrowly as to deprive insureds of appropriate protection against boycotts.

The varying viewpoints reflected by the different lower court decisions vividly present to this Court the issue of the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act. Since the precedent established in this case can have a fundamental impact on the viability of state insurance regulation, the NAIC

Sur. Co., 506 F.2d 732 (5th Cir. 1975); Mathis v. Automobile Club Inter-Ins. Exch., 410 F.Supp. 1037 (W.D. Mo. 1976); McIlhenny v. American Title Ins. Co., 418 F.Supp. 364 (E.D. Pa. 1976); Royal Drug Co. v. Group Life & Health Ins. Co., 415 F.Supp. 343 (W.D. Tex. 1976) *rev'd on other grounds,* — F.2d — (5th Cir. 1977); Seasongood v. K & K Ins. Agency, 414 F.Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds,* 548 F.2d 729 (8th Cir. 1977); Frankford Hosp. v. Blue Cross, 417 F.Supp. 1104 (E.D. Pa. 1976); Transnational Ins. Co. v. Rosenlund, 261 F.Supp. 12 (D. Ore. 1966).

[70] *See* Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963), *cert. denied,* 376 U.S. 952 (1964).

[71] *See* Travelers Ins. Co. v. Blue Cross, 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973).

[72] *See* Ballard v. Blue Shield, 543 F.2d 1075 (4th Cir. 1976).

[73] *See* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977).

suggests that the Court consider the following standard for defining the scope of the boycott exception:

> *The exception may extend to insurer-insured relationships but only in the limited situations in which the antitrust result would not intrude into an area of:*
>
> *(a) state insurance regulatory activity, or*
>
> *(b) state sanctioned or permitted insurer activity, provided that such sanctioned or permitted activity is consistent with a valid "insurance" regulatory purpose, as distinguished from being simply a device to permit industry avoidance of antitrust prohibitions.*

This proposed standard, of course, requires a rejection of the lower court's broad construction of the "boycott" exception to the McCarran Act. Because of the NAIC's limited role as *amicus curiae,* no effort will be made to develop fully the legal arguments supporting a rejection of the expansive definition propounded by the first circuit. Suffice it to say that the lower court's view of the "boycott" exception would: (1) result in conflict between federal antitrust regulation and state insurance regulation contrary to the basic policy of the McCarran Act,[74] (2) cause judicial usurpation of con-

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[74] The basic underlying purpose of the McCarran Act is quite clear. Congress declared that "the continued regulation . . . by the several States of the business of insurance is in the public interest. . . ." 15 U.S.C. § 1011 (1970). Shortly after its enactment, this Court said "[o]biviously Congress' purpose was broadly to give support to the existing and future states systems for regulating and taxing the business of insurance." Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946). This Court more recently reaffirmed this conclusion in *SEC v. National Securities, Inc.,* 393 U.S. 453, 459 (1969) when it said that the McCarran Act was an attempt "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." To achieve this purpose, the McCarran Act, among other things, essentially precluded the application of the antitrust laws to the business of insurance.

gressional authority by attempting to "neutralize" that Act,[75] and (3) violate principles of statutory construction by failing to construe the McCarran Act in a manner which would harmonize that Act as a whole and reflect the public policies on which the Act is premised.[76]

The adoption of the lower court's approach works contrary to congressional intent under the McCarran Act. Its expansive definition of the scope of the boycott exception possesses the potential of encompassing virtually every Sherman Act conspiracy allegation relating to the price, availability and terms of insurance within the ambit of the boycott exception. *See* Judge Campbell's dissent, 555 F.2d at 14-15. For example, price fixing allegations can be couched in terms of a conspiracy to refuse to sell coverage except at a certain rate. (The Respondents seek, among other things, an injunction prohibiting Petitioners from denying them medical malpractice insurance coverage on an occurrence basis at reasonable rates, 555 F.2d at 3.) *This approach would enable policyholders to convert grievances concerning policy terms into antitrust claims and interject courts into the consumer protection role heretofore reserved to the states.*

Furthermore, not only does the lower court's expansive definition interject the federal courts into the area of insurance regulation, thereby inviting policyholders and potential policyholders to invoke a federal forum to redress alleged grievances whenever they are not fully satisfied with the regulatory approach (unhappiness with higher than desired rates approved by the state), but also the "potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting § 1012(b) of the Act," 555 F.2d at 15. In short, if the lower court's expansive definition of the boycott exception is permitted to stand, the decision would "emasculate" state regulation under the McCarran Act. Such an expansive definition of the scope of the boycott exception is clearly contrary to the purpose of Congress and creates a vast potential for regulatory and antitrust conflict in an area which Congress clearly delegated primacy to the states.

[75] *See* note 66 *supra* and accompanying text.

[76] Despite the First Circuit Court of Appeals assertion that the language of the boycott exception is unambiguous and broad, other lower courts have come to a different conclusion. *See* note 69 *supra*. Furthermore, Judge Campbell in his dissent points out that:

> Significantly this language does not track the broad "contract, combination . . . or conspiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been,

In contrast to the erroneous broad construction of the lower court, the NAIC's proposed standard for the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act provides a reconciliation, at least to some extent, between those courts and judges attempting

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> as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts — every court except, now, ourselves — have held that the § 1013(b) exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. 555 F.2d at 14.

Similarly, the court of appeals in the *Proctor* case "recognize[d] that the terms of the provisions are not self defining. . ." 561 F.2d at 274. Furthermore, the various courts' review of legislative history as to the scope of the boycott provision has produced no consensus. Thus, neither the language of the provision nor legislative history seem to be determinative in construing the boycott exception. However, various fundamental rules of statutory construction lead to the conclusion of rejecting the lower court's broad definition. First, the matter contained in a statute should be interpreted together and in a manner to harmonize with other sections of the Act and with the purpose of the legislation. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 81 (4th ed., C. Sands ed. 1973). Second, a statutory section outlining the policy of the statute may be used to resolve doubtful statutory meaning. *Id.* at 403. Furthermore, this Court has said:

> The *policy* as well as the letter of the law *is a guide to decision.* Resort to the policy of a law may be had to . . . qualify its apparent absolutes. . . . The process of interpretation also misses its high function if a strict reading of law results on the *emasculation* or deletion of a provision which a less literal reading would preserve.

Markham v. Cabell, 326 U.S. 404, 409 (1945) (emphasis supplied).

The expansive interpretation of the boycott provision by the lower court in this case — that is, that any concerted refusal to deal falls within the exception regardless of state regulatory activity in the area — contravenes the basic purpose of the McCarran Act in that it sub-

to avoid the emasculation of the McCarran Act, those decisions which have difficulty finding statutory language or legislative intent which would entirely exclude insurer-insured reltionships from the exception, and the *Proctor* case which suggests a need to accommodate the purpose of the McCarran Act's exemption from the antitrust laws with the boycott exception to that exemption. But most importantly, the NAIC's proposed standard would avoid a fundamental undermining of the state insurance regulatory mechanism and the concomitant protection it affords to the insurance-buying public.

The NAIC believes that its limited, but not narrowest, construction of the "boycott, coercion, or intimidation" exception to the McCarran Act is supported by the public policies inherent in both the Sherman Act and the McCarran Act, is consistent with the congressional intent supporting both Acts, and follows accepted principles of statutory construction. For these reasons the NAIC urges this Court to give special consideration to its proposed standard as the best vehicle for judging future "boycott, coercion, or intimidation" claims under the McCarran Act.

If the NAIC's suggested standard is applied to the facts of the case now before this Court, it is evident that Respondents' antitrust claim must be dismissed. In the

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merges state insurance rgulation to antitrust law and "emasculates" the basic provision of the Act. As Judge Campbell concluded:

> More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that § 1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act.

555 F.2d at 15. A narrower construction of the boycott exception is essential to harmonize the Act as a whole in the context of the fundamental congressional purpose in enacting the McCarran Act.

instant case, a class action was brought on behalf of a Rhode Island physician and patients against four insurers alleged to have refused to provide medical malpractice insurance in violation of the antitrust laws prohibiting a conspiracy in restraint of trade. However, the insurance industry in Rhode Island is subject to regulation pursuant to the comprehensive insurance code of that state, including anticompetitive and unfair trade practice provisions.[77] In addition, at about the time this suit was commenced, Rhode Island was affirmatively seeking a solution to the cost and availability problems associated with medical malpractice insurance. A Rhode Island Joint Underwriting Association has subsequently been established to provide malpractice insurance coverage to health care providers who are unable to obtain such coverage from the voluntary market.[78] Thus, this case clearly poses a situation in which state insurance regulation has affirmatively acted in areas of legitimate and fundamental insurance regulatory concern — the price and availability of insurance. Defining the scope of the boycott exception to permit this antitrust litigation to continue would conflict with state insurance regulatory activity and establish the federal courts as an alternative consumer protection agency. Under th NAIC standard discussed above, the boycott exception to the McCarran Act does not encompass this action and the lower court's decision to the contrary should be reversed.

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[77] R. I. GEN. LAWS ANN. § 27-29-4 (1969).

[78] *Id.* at § 42-14.1-1 (Supp. 1976).

SUMMARY OF ARGUMENT

In *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) this Court declared that "the relationship between insurer and insured" lay at the "core of the 'business of insurance.'" Since Congress opted for a state-directed system of insurance regulation under the McCarran Act in 1945, states have continued their long-standing supervision of "the relationship between insurer and insured." A fundamental and essential aspect of regulating this relationship is the oversight of the risk assessment process. By reviewing the rating and underwriting procedures of risk assessment, state insurance commissioners not only carry out their McCarran Act responsibilities but satisfy numerous public policy objectives which are inherent in any system of insurance regulation.

If this Court extends permissible antitrust "boycott" actions to relationships between insurers and insureds on an expansive basis as proposed by the lower court, it will clearly create a conflict between two distinct legal systems — state insurance regulation and federal antitrust regulation. Both of these systems cannot be applied to "the relationship between insurer and insured" without disrupting the delicate balance between federal and state regulatory policies under the McCarran Act. Because the confrontation between federal antitrust policies and state insurance regulatory policies would be basic and conceptually irreconcilable, it would "hamstring" existing state regulatory efforts aimed at property-casualty insurance rates. insurance availability, policy form content and insurance company solvency.

Contrary to the view of the lower court, the NAIC does not find that the pre-McCarran Act *Parker v. Brown*

doctrine insulates state insurance regulatory schemes from an expanded "boycott, coercion, or intimidation" exception. This Court's recent limitations on the *Parker v. Brown* decision indicate that only direct state regulatory activities will qualify for a state-action exemption from federal antitrust laws. As a result, the NAIC urges this Court to adopt a standard for interpreting the "boycott, coercion, or intimidation" exception to the McCarran Act which preserves the primacy of state insurance regulation but does not foreclose antitrust claims which do not usurp this primacy.

CONCLUSION

The lower court's extension of the "boycott, coercion, or intimidation" exception to the McCarran Act to insurer-insured relationships would seriously impede existing state insurance regulatory efforts. Because the antitrust concept of a "boycott" is irreconcilable with fundamental principles of insurance theory, federal antitrust law and state insurance law cannot be made to apply to insurer-insured relationships without a direct confrontation between federal and state policies. If state insurance regulation in the areas of property-casualty ratemaking, insurance availability, policy form approval and insurance company solvency are made subservient to federal antitrust actions involving claims of alleged "boycotts" by insureds, such a result would not only be inconsistent

with the basic thrust of the McCarran Act, but would portend grave consequences for the interests of the insurance-consuming public as a whole. For this reason the NAIC urges this Court to reverse the lower court's decision as to the broad scope of the "boycott" exception to the McCarran Act in favor of a more narrow, but not narrowest, interpretation of that exception.

Respectfully submitted,

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